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Special Projects

The Massachusetts Contingency Plan was recently amended to expand and change the Special Project Designation, 310 CMR 40.0060. This revised regulation provides flexibility under the MCP for **public projects** by extending the deadline for Tier Classification from one year up to five years. This extension gives the municipality or public agency extra time to prepare for the cleanup before starting the clock for comprehensive response actions under the Massachusetts Contingency Plan. This flexibility is intended for public projects with multiple disposal sites, large scale infrastructure improvement projects (e.g. construction or expansion of rail lines or roadways where contamination may be encountered), and it can also be used for private projects where the municipality takes the lead in encouraging cleanup and redevelopment.

In the brownfields context, Special Project designation can be used by municipalities to facilitate the redevelopment of privately held sites where contamination is suspected. The municipality can apply for the designation in order to gain time to assess and market the property to potential developers prior to commencing the cleanup. For example, a property owner may want to sell his industrial site, but refuses to conduct a site assessment because he is afraid that if he verifies that the site is contaminated, he will have to spend all of his assets on remediation and litigation. However, since buyers will not buy without knowing the environmental condition of the site, the owner or prospective purchaser must conduct a site assessment. In this situation, the municipality can apply for Special Project status, conduct the site assessment necessary to market the site and then find a developer who is able to buy the site to remediate and redevelop it. The concerned owner is temporarily relieved of any assessment and cleanup obligations. If a buyer is found through this process, the seller will be able to divest without having to further assess and clean the property.

The following is a reprint of the regulation describing how the program works. Applications for a Special Project permit are available from the Massachusetts Department of Environmental Protection.

40.0060: Special Project Designation

310 CMR 40.0061 through 40.0068, cited collectively as 310 CMR 40.0060, set forth the requirements and procedures for Special Project designations.

40.0061: Purpose and Eligibility

(1) The Department may designate certain projects as "Special Projects." Special Project designation shall authorize the Department to:

- (a) extend the deadline for submitting a Tier Classification Submittal required by 310 CMR 40.0500 and 40.0600; and
- (b) establish an alternative annual compliance assurance fee schedule for the Special Project as described in 310 CMR 4.00.

(2) Eligible Applicants. Any public body politic, including but not limited to any federal, state or municipal governmental entity, may apply to the Department for designation of a project as a Special Project.

(3) Eligible Projects. Projects eligible for Special Project designation may include but are not limited to infrastructure improvement projects (e.g., construction or expansion of rail lines or roadways), redevelopment of one or more properties, or the performance of coordinated response actions addressing multiple disposal sites. Eligible projects shall meet each of the following criteria:

- (a) one or more disposal sites are, or are likely to be, located within the boundaries of the project;
- (b) proposed response actions will be managed in a coordinated fashion;
- (c) the applicant has demonstrated its support of the project by committing and/or securing public financing for the project (e.g., by providing direct financing, tax increment financing or special tax assessments pursuant to G.L. c. 23A, §§ 3A through 3F, etc.); and
- (d) compliance with the response action deadlines described in 310 CMR 40.0500 would unreasonably decrease the cost-effectiveness of project implementation.

(4) Disposal sites for which a Tier Classification Submittal has been submitted to the Department shall not be eligible for Special Project designation.

40.0062: Procedures for Applying for Special Project Designation

(1) Contents of Application. Each application filed with the Department shall include, at a minimum, the following:

- (a) a completed Transmittal Form for Permit Application and Payment using the form established by the Department for such purposes;
- (b) the applicable completed Permit Application using the form established by the Department for such purposes;
- (c) the applicable permit application fee payable pursuant to 310 CMR 4.00;
- (d) a photocopy of the fee payment;
- (e) a description of the project and its expected duration, an explanation of why Special Project designation is necessary to successfully implement the

project, the requested duration of the Special Project designation, and a description of how the project meets the criteria in 310 CMR 40.0061(3);

(f) a map of the land area for which the Special Project designation is sought, including identification of all properties that would be included;

(g) the Release Tracking Numbers for any known releases of oil and/or hazardous material at or from the subject properties that have been reported to the Department, and a brief description of such releases and the status of response actions;

(h) to the extent known, a description of response actions planned in the Special Project, including a proposed schedule;

(i) the name, business address, and telephone number of the person who will be conducting response actions under the Special Project designation;

(j) a certification by the applicant and the person described in 310 CMR 40.0062(1)(i) (if different from the applicant) that, except as fully disclosed in the application, he or she is not subject to any outstanding administrative or judicial environmental enforcement action under any federal, state or local law;

(k) a demonstration that the applicant has notified the persons who own or control the properties included in the Special Project designation and a description of how access to the properties will be obtained in order to perform response actions; and

(l) the certification of the submittal required by 310 CMR 40.0009 by the applicant and the person described in 310 CMR 40.0062(1)(i) (if different from the applicant).

(2) An application for Special Project designation shall not be deemed complete if the Department determines that such application:

(a) fails to contain all information and certifications required by 310 CMR 40.0062(1);

(b) fails to include the applicable fee established by 310 CMR 4.00; or

(c) is incorrectly filled out.

(3) An application for Special Project designation shall be reviewed in accordance with the procedures described in 310 CMR 4.04 and in accordance with the schedule described in 310CMR 4.10(10)(j).

(4) Public Review of Application. Upon issuance of a proposed decision to grant or deny a Special Project designation, the Department shall conduct a public comment period.

(a) Upon such issuance, the applicant shall publish a legal notice of the proposed decision and its availability for public review and comment in a newspaper which circulates in the community in which the project is located. Such legal notice shall be in a form established by the Department and shall include information about how and where the public can review the application for Special Project designation and the deadline for submission of comments to the Department.

(b) At least three days prior to publication of the legal notice, the applicant shall deliver a copy of the notice by mail or hand to the Chief Municipal

Officer and Board of Health in the community in which the project is located, and to the Department.

(c) The public comment period shall run for at least 20 calendar days. Upon request or upon its own initiative, the Department may extend the public comment period.

(5) Response Action Deadlines During Special Project Designation Application Review. Notwithstanding 310 CMR 40.0501(3), a release proposed for inclusion within a Special Project designation shall not be subject to the deadline for Tier Classification while the Special Project designation application is being reviewed by the Department. If the application is denied by the Department pursuant to 310 CMR 40.0060 and 310 CMR 4.00, then the deadline for Tier Classification shall be the original deadline for Tier Classification (provided such deadline has not passed) or 90 days from the date of the Departments denial, whichever is later.

40.0063: Department Decision Concerning Special Project Designation

(1) In considering whether to grant or deny an application, the Department shall consider the following:

- (a) whether risks posed by releases at or from property proposed for inclusion in the Special Project designation can be identified and managed in a manner which protects health, safety, public welfare, and the environment;
- (b) whether the project meets the eligibility criteria in 310 CMR 40.0061(3);
- (c) whether compliance with the response action deadlines described in 310 CMR 40.0500 would unreasonably decrease the cost-effectiveness of project implementation;
- (d) whether implementation of the proposed response actions is feasible and likely, and whether the applicant and other participants (e.g., property owners) have agreed to such implementation;
- (e) the environmental compliance history of the applicant and the party who will implement proposed response actions (if different from the applicant);
- (f) whether significant public comments can be addressed in the decision;
- (g) whether Department oversight of response actions is necessary; and
- (h) any other factor the Department deems relevant to the decision.

(2) The Department may deny a Special Project designation application if it determines that:

- (a) the applicant has submitted information in the application which he or she knew or reasonably should have known was false or misleading;
- (b) the application was not completed by an applicable deadline;
- (c) risks posed by releases at or from the property proposed for inclusion in the Special Project designation cannot be identified and managed in a manner which protects health, safety, public welfare, and the environment;
- (d) compliance with the response action deadlines described in 310 CMR 40.0500 would not unreasonably decrease the cost-effectiveness of project implementation;

- (e) implementation of the proposed response actions is not feasible or likely, or property owners included in the Special Project designation have not agreed to such implementation;
- (f) there is significant public opposition to granting the Special Project designation with respect to performance of response actions;
- (g) the applicant is not able or willing to oversee and coordinate implementation of the Special Project; or
- (h) the Department intends to oversee, undertake or arrange for the performance of necessary response actions at the disposal site.

(3) The Department's decision shall establish an appropriate schedule for complying with the requirements of 310 CMR 40.0000.

(a) No Special Project designation shall be approved for a period longer than five years from the date of the Department's decision.

(b) The designation may be extended for one or more periods not to exceed five years each upon Department approval pursuant to 310 CMR 40.0066

(4) A Special Project designation shall become effective upon issuance by the Department, unless a request for an adjudicatory hearing is made pursuant to 310 CMR 40.0050.

40.0064: Special Project Designation Conditions

(1) Any person performing response actions to address a release subject to a Special Project designation shall comply with M.G.L. c. 21E, 310 CMR 40.0000, the terms and conditions of the Special Project designation and any other applicable federal, state or local laws.

(2) All Special Project designations shall have as conditions of designation the requirement that the permittee shall:

- (a) oversee and coordinate the Special Project;
- (b) comply with the terms and conditions of response actions approved by the Department during the course of the Special Project, including, but not limited to, IRAs and RAMs;
- (c) comply with the notification regulations at 310 CMR 40.0300 for any release or threat of release of oil and/or hazardous material;
- (d) comply with the requirements for conducting Immediate Response Actions to address two- or 72-hour releases or threats of release or conditions of substantial release migration in accordance with 310 CMR 40.0400;
- (e) provide reasonable access to property owned or controlled by the permittee to employees, agents and contractors of the Department for all purposes authorized by c. 21E and to other persons performing response actions;
- (f) avoid engaging in activities which could prevent or impede the implementation of reasonably likely response actions in the future;
- (g) file a Tier Classification Submittal for any release which requires further response actions by the date the Special Project designation expires, unless such designation is extended pursuant to 310 CMR 40.0066;

(h) provide the Department with a report describing the status of response actions on an annual basis, unless an alternative schedule is established in the Special Project designation; and

(i) comply with any other conditions necessary to ensure the appropriate implementation of response actions.

(3) Special Project designation shall not grant any property rights or exclusive privileges, nor shall it authorize any injury to private property or taking of property rights.

40.0065: Modification of Special Project Designation

(1) The permittee may seek to modify a Special Project designation to:

(a) add or remove property subject to the Special Project designation;

(b) change the schedule of proposed response actions, excluding extending the duration of the Special Project designation; or

(c) change any other aspect of the Special Project designation.

(2) A request for a modification of Special Project designation shall include the following:

(a) a completed transmittal form using the form established by the Department for such purposes;

(b) a description of and rationale for the modification sought; and

(c) the certification required by 310 CMR 40.0009.

(3) Special Project designation modification shall not be subject to processing requirements under 310 CMR 4.00.

(4) In considering whether to grant or deny a request for a modification of a Special Project designation, the Department shall consider the criteria in 310 CMR 40.0063(1).

(5) Within 60 days of receipt of a request to modify a Special Project Designation, the Department shall respond in writing with a proposed decision to either approve or deny the modification. Upon issuance of the Department's proposed decision, the requirements in 310CMR 40.0062(4) shall apply.

(a) In the absence of significant public comment providing a basis for the Department to deny the modification or significantly alter the Special Project designation proposed to be modified, the Department shall grant or deny the modification within 30 days following the close of the public comment period.

(b) If significant public comment is received, the applicant shall have 30 days following the close of the public comment period to respond. Within 30 days of the Department's receipt of the applicant's response the Department shall grant or deny the modification.

40.0066: Extension of Special Project Designation

(1) A permittee may request an extension of Special Project designation. A request for an extension of Special Project designation shall include the following:

- (a) a completed transmittal form using the form established by the Department for such purposes;
- (b) a statement as to why the extension is sought and the requested duration of the extension;
- (c) a report describing the status of response actions and any known instances of noncompliance with 310 CMR 40.0000 associated with the Special Project designation, and a plan and schedule for proposed or continuing response actions;
- (d) an LSP Opinion indicating that the plans and/or reports submitted are in conformance with the requirements of 310 CMR 40.0000;
- (e) a certification by the applicant and the person described in 310 CMR 40.0062(1)(i) (if different from the applicant) that, except as fully disclosed in the request for extension, he or she is not subject to any outstanding administrative or judicial environmental enforcement action under any federal, state or local law; and
- (f) the certification required by 310 CMR 40.0009 by the permittee and the person described in 310 CMR 40.0062(1)(i) (if different from the applicant).

(2) A Special Project designation extension shall not be subject to processing requirements under 310 CMR 4.00.

(3) In considering whether to grant or deny a request for an extension of Special Project designation, the Department shall consider the criteria in 310 CMR 40.0063(1).

(4) Within 60 days of receipt of a request to extend a Special Project Designation, the Department shall respond in writing with a proposed decision to either approve or deny the extension. Upon issuance of the Department's proposed decision, the requirements in 310 CMR 40.0062(4) shall apply.

(a) In the absence of significant public comment providing a basis for the Department to deny the extension or significantly modify the Special Project designation proposed to be extended, the Department shall grant or deny the extension within 30 days following the close of the public comment period.

(b) If significant public comment is received, the applicant shall have 30 days following the close of the public comment period to respond. Within 30 days of the Department's receipt of the applicant's response the Department shall grant or deny the extension.

40.0067: Termination of Special Project Designation

(1) A permittee may voluntarily surrender a Special Project designation provided that such permittee notifies the Department in writing of such surrender using the transmittal form established by the Department for such purpose and submits a report to the Department describing the status of response actions. If applicable, the permittee shall also comply with 310CMR 40.0170(10).

- (2) Special Project designation shall terminate if:
 - (a) the permittee voluntarily surrenders the designation as described in 310 CMR 40.0067(1);
 - (b) the permittee submits a Class A or B Response Action Outcome Statement pursuant to 310 CMR 40.1000 for the release(s) covered by the Special Project designation;
 - (c) an assessment is completed that demonstrates that no releases or threats of release have occurred at or from the properties subject to Special Project designation; or
 - (d) the Special Project designation expires.

40.0068: Suspension and Revocation of Special Project Designation

- (1) The Department may suspend or revoke a Special Project designation for cause including, but not limited to, the following:
 - (a) any violation of M.G.L. c. 21E, 310 CMR 40.0000, or Special Project designation condition, or other applicable law or regulation;
 - (b) the submittal of false or misleading information by the permittee; or
 - (c) for nonpayment of annual compliance assurance fees required pursuant to 310 CMR 4.00.
- (2) Prior to the suspension or revocation of a Special Project designation for cause, the Department shall issue a notice of intent to suspend or revoke the Special Project designation which describes the basis for the proposed suspension or revocation and informs the person to whom it is issued of his or her right to request an adjudicatory hearing pursuant to M.G.L. c.30A.
- (3) Notwithstanding 310 CMR 40.0068(2), suspension or revocation of a Special Project designation because of nonpayment of annual compliance assurance fees shall be processed in accordance with 310 CMR 4.03(7).
- (4) Upon suspension or revocation of a Special Project designation, the Department shall establish new deadlines for Tier Classification for any releases which require further response actions.